In the Supreme Court of the United States.

OCTOBER TERM, 1976.

No. 76-1255.

FRANCIS A. VITELLO,
PETITIONER,

v.

CHARLES GAUGHAN,
SUPERINTENDENT, MASSACHUSETTS CORRECTIONAL INSTITUTION, BRIDGEWATER,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner's Reply Memorandum.

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Table of Authorities Cited

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Constitutional and Statutory Provisions

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PETITIONER'S REPLY MEMORANDUM

I.

Respondent's Opposition confirms that this case squarely presents important questions never before considered by the Court regarding whether Stone v. Powell, 428 U.S. 465 (1976), and Davis v. United States, 417 U.S. 333 (1974) foreclose enforcement of the Title III suppression remedy in federal habeas corpus proceedings

under 28 U.S.C. §2254. Beyond this, respondent's defense of the decision below rests so completely on fundamental misconceptions of Stone and Davis, that it only serves to underscore the need for review by this Court.

A. Respondent concedes that the suppression remedy petitioner asserts under Title III was created by Congress, while the suppression remedy involved in Stone was judicially created. But respondent contends that this is irrelevant since Stone restricted the substantive scope not of the remedy, but of habeas corpus jurisdiction. Stone provides no support whatsoever for this theory, and, indeed, respondent conspicuously fails to claim any from the Court's opinion.[1]

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[1] If the substantive scope of habeas jurisdiction had been the issue in Stone, then the Court would necessarily have been required to confront, among other venerable precedents, Brown v. Allen, 344 U.S. 443. But nothing in Stone suggests that Brown has been overruled. Had Stone overruled Brown, it would represent a sudden and inexplicable reversal of many recent habeas decisions enforcing the Fourth Amendment, see e.g., Lefkowitz v. Newsome, 420

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U.S. 283, in which the majority never indicated the slightest doubt of the Court's antecedent authority stemming from Brown.

Respondent contends that a substantive cut-back in habeas jurisdiction would not conflict with Brown, because that decision announced no substantive doctrine. In respondent's view, Brown merely recognizes the Court's plenary "power to alter the writ," according to its own policy calculations. (Res. Op. p. 6) This reading of Brown is completely unfounded, and propogates a dangerous and baseless conception of judicial autocracy and Congressional abdication. The Court never claimed such power, and, indeed, the Brown Court was quite explicit in recognizing that its ruling was an expression of congressional will, not its own. "Jursidiction over applications for federal habeas corpus," the Court stated, "is controlled by statute." 344 U.S. at 459. While Brown expanded the substantive scope of habeas corpus, it did so strictly "to give fair effect to the habeas corpus jurisdiction as enacted by Congress." Id., at 499 (opinion of Justice Frankfurter). Again, resorting to the statutes establishing habeas jurisdiction and the Congress' intent behind them, Justice Frankfurter concluded that foreclosing federal collateral review on the basis of a prior state determination would give the state court "the final say which the Congress, by the Act of 1867, provided it should not have." Id., at 500.

Stone holds that defendants have no Fourth Amendment right to have illegally seized evidence suppressed.[2] As such, Stone reiterates the Court's previously announced conclusion that the suppression rule applied in Mapp v. Ohio, 367 U.S. 643 (1961) is a judicially created "remedial device," which can be "restricted [by the Court] to those areas where its remedial objectives are thought most efficaciously served." United States v. Peltier, 422 U.S. 531, 620 (1975); see also United States v. Janis, 428 U.S. 433, 446-447 (1976). The judiciary has no such policy-making power over the Title III suppression remedy.

Respondent recognizes that the Title III suppression rule is a "codification" of the judicial suppression rule applied in Berger v. New York, 388 U.S. 41 (1967). But contrary to respondent's unsupported argument, the legislative history and language make it clear that the suppression

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[2] It appears that concepts of due process might require suppression, even though the Fourth Amendment does not, where the seizure is undertaken in a bad faith or particulary offensive manner. See United v. Janis, 428 U.S. 433, 444 (1976).

remedy enacted by Congress was intended not only to have the same scope as the judicial rule had in the then "present [1967] search and seizure law" (see Pet. p. 21), but also to have application in a far greater range of areas than the judicial rule. See Pet. p. 22-23; also compare 18 U.S.C. §2515 with United States v. Janis, supra. Overwhelming evidence demonstrates that Congress never intended to accept the significant degree of illegal and excessive wiretapping that would be fostered by precluding application of the Title III suppression rule in federal habeas corpus proceedings.[3]

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[3] Besides being rather presumptuous, respondent's attempt to substitute his policy judgment for that of Congress is basically flawed. Wiretap violations of the Fourth Amendment involve materially distinct considerations than those raised by the illegal seizure of physical evidence.

First, Title III provides a detailed, explicit code of constitutional and statutory requirements. By contrast, Fourth Amendment rules governing seizure of physical evidence are embodied in case law that, as Justice Powell found, "is difficult for courts to apply, let alone for the policeman on the beat to understand." Schneckloth v. Bustamonte, 412 U.S. 218, 269 (1972)(Concurring opinion). While relying heavily

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on the Schneckloth concurrence, respondent completely ignores Justice Powell's conclusion that because those "nonfrivolous Fourth Amendment claims that survive for collateral review are most likely to be in this grey, twilight area," they present the cases "where the deterrence function of the exclusionary rule is least efficacious..." 412 U.S. at 269-270. The reverse is true in the wiretap area. After enactment of Title III, the requirements are clear. Violation, therefore, can be taken as proof of police bad faith or reckless disregard of the law. That is precisely the case here, where, the prosecutor showed gross disrespect for the warrant requirement by not even reading the wiretap order to determine the operating time limits. Clearly, such indifference to Title III requirements will be deterred by strict and maximum enforcement of the suppression remedy. Because the Title III code is so clear, the police will have little difficulty in understanding and complying with its requirements. Strict enforcement can thus reduce the judicial and social costs noted in Schneckloth and Stone, by sharply reducing the number of violations the courts must hear and redress, and the number of guilty persons the courts must free.

Second, maximum deterrent force is required for wiretapping, by contrast to seizure of physical evidence, because wiretapping effects an irrevocable seizure of the conversations, see United States v. Focarile, 340 F.Supp. 1033, 1047 (D.Md. 1972), aff'd on other grds., 416 U.S. 505, and because the inherent secrecy of wiretap surveillance can be exploited to secure,

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retain and use information surrepticiously and unchecked by judicial authority.

Third, to be sure, federal habeas power should be exercised where a claim of innocence is made, but it does not follow that it should not be exercised unless the defendant can make such a claim. Habeas enforcement of Title III ensures the protection of the innocent, not necessarily defendants, but the greater population, whose innocent privacy would surely be jeopardized in the absence of this enforcement. Other constitutional rights enforced in habeas proceedings, like those relative to grand jury selection and burden of proof, serve a similar function. It should also be noted that the first and most basic use of habeas power was to review the court's jurisdiction to try the case, see Schneckloth v. Bustamonte, supra, at 255, a question not inherently or always likely to aid in protecting the innocent or finding the truth. See e.g., Matter of Moran, 203 U.S. 96 (1906).

B. Respondent makes the crucial concession that Davis has no application to Fourth Amendment wiretap claims. (Res.Op. p. 7) And it appears respondent also acknowledges the constitutional nature of petitioner's charge concerning the state court's failure to determine and specify in its order, operating time limits. Although respondent does not say so directly, the implication from his concessions is that Davis adds no obstacle beyond Stone to the exercise of federal habeas jurisdiction over petitioner's claim of constitutional right.

But no matter how petitioner's claim is characterized, Davis has no application in this case. Davis and Hill v. United States, 368 U.S. 424 (1962) regulate reaccess to federal court for federal prisoners who have or could have exercised a right to litigate their claims at trial and direct appeal. By contrast, petitioner invokes federal jursidiction for the first time to review his claims of federal right. Since Congress' principle objective in establishing habeas jurisdiction was to subject all claims of federal right to federal scrutiny, that objective is sub-

stantially satisfied when a prisoner has had one full opportunity as of right to federal review. At that point considerations of efficiency, finality and judicial economy appropriately operate to close the gate to all cases except those presenting special circumstances. See 28 U.S.C. §2244(a) and (b). But Congress' objective cannot be served in this case, where §2254 jurisdiction is invoked for the first time, except by exercise of that jurisdiction.[4]

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[4] Thus, while the substantive "grounds for relief under §2255 are equivalent to those encompassed by §2254," it does not follow, as respondent contends (Res. Op. p. 8), that the finality rule in both proceedings is identical. Respondent recognizes this and attempts to blur the distinction between substantive and management questions by quoting out of context the Davis phrase: "in operative effect." In context, that phrase refers solely to the substantive equivalence of §2254 and §2255 jurisdiction. See Davis v. United States, supra at 344-345.

Application of Davis conflicts not only with Congress' purpose in establishing §2254 habeas jurisdiction, but also with Congress' express statutory mandate for the exercise of that jurisdiction. In 28 U.S.C. §2244(c), Congress has declared that state prisoners are entitled to one full opportunity to federal habeas review of any claim of "Federal right," without limitation as to "prejudice" or otherwise. The sole exception to this provision for mandatory review exists in a case where this Court has, on certiorari or appeal from the state judgment of conviction, adjudicated the federal claim on the merits.

II.

Respondent's answer to petitioner's showing of prejudice is to ignore it. Respondent misleads when he suggests that the only problem with the wiretap order was "the inadvertent omission of a termination date," and that this error was cured because "the surveillance was concluded within 12 days (thus satisfying the purpose underlying the enactment of §2518(4)(e))." (Res.Op. pp. 2, 12) True, the order contained no termination date, but the chief

cause for its invalidity is that the state court failed to determine and to specify in the order the operating time for the tap.[5]

The termination date represents only the number of days the tap may remain installed, not the number of days it may actually operate. Compare 18 U.S.C. §2518 (4)(e) with §2518(5). The latter is a matter governed by the constitutional standard of "necessity." Again, it is true that the operating time requested

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5 Respondent seeks to blunt the issue by claiming the question was not raised below. On the contrary, petitioner registered an unqualified objection to the absence of all required time limits in the wiretap order. Petitioner did not contest the factual basis of the state court's view of how much operating time was "necessary," because, as no such determination was made or specified, that challenge would be premature.

was 15 days, but that represents the maximum amount of time possible, and under the circumstances of this case it cannot be presumed that the prosecutor's request was necessarily granted. It is quite likely that the state court, assuming it made any determination regarding operating time, could have concluded that all that was "necessary" was three or four days operating time, given that this was a second wiretap against the same person, given that the tap would be installed in a private home, and given that the prosecution may always request an extension of the order. See 18 U.S.C. §2518(5). The evidence used to convict petitioner may have been derived from communications secured on the 11th or 12th day of operation, or otherwise at a point when the tap was operating in excess of the time the court might have specified in the order. How can respondent claim the prosecutor complied with the operating time limits, when no one knows what those limits were? Moreover, respondent's insistence that the application filled the order's time limit blanks is fallacious; since when is a prosecutor's request automatically converted

into a judge's order?[6]

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[6] Respondent's citation of cases where wiretap applications have been read as elucidating a provision of the wiretap order (Res.Op. p. 3 n. 3) only accentuate the substantiality of the wiretap illegalities petitioner asserts.

In United States v. Tortortello, 480 F.2d 764 (2nd Cir. 1973), the issuing court failed to describe the type of communication sought to be intercepted, and the particular offense to which it relates, but the order was sustained because it specifically referred to and incorporated the paragraphs of the application detailing the particulars.

United States v. Manfredi, 488 F.2d 588 (2nd Cir. 1973) held that the direction to minimize interceptions, required to be placed in all orders, was "talismanic minimization language," the omission of which did not void the order. Id., at 598. The court noted that the application "promised" minimization. Of course, in this case the prosecution cannot promise itself into operating time the court has not granted. See also United States v. Cirillo, 499 F.2d 872 (2nd Cir. 1974). Finally, in United States v. Poeta, 455 F.2d 117 (2nd Cir. 1972), the court found that exclusive of the wiretap fruits, the evidence against the defendant was "over whelming," and that the order itself contained language indicating that the provision involved was mistakenly crossed out.

Failure to determine and specify the operating time limits is a violation of constitutional magnitude and violates a requirement that clearly plays a crucial and substantive role in the Title III scheme. Moreover, absence of operating time limits rendres the order "insufficient on its face" under 18 U.S.C. §2518(10)(a)(ii). True to the constitutional model, the Act directs suppression of all evidence seized on the authority of such a facially defective order regardless of whether the prosecution was well intending or claims "substantial compliance."[7]

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[7] United States v. Chavez, 416 U.S. 562 concerned subpart (i) of §2518(10)(a), and is distinguishable from this case where the challenge is brought under subpart (ii). In Chavez, the Court found that the phrase "unlawfully intercepted" did not encompass any and all violations of the Act's myriad requirements. Instead, it focussed only on those requirements playing a "substantive role" in the legislative scheme. See United States v. Donovan, 97 S.Ct. 658. Subpart (ii) contains no such restriction. It clearly condemns the evidence obtained under the authority of an order that fails to contain the specified particularizations set forth in §2518(4) and (5). Even if the scope of subpart (ii) did not encompass every particularization required, it certainly would include the key and constitutionally required specification of operating time.

Conclusion

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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